A PROBLEM IN CONNECTION WITH SHIFTING EXECUTORY DEVISES.

Now that the device (which must have been a source of considerable profit and interest to lawyers of a few generations ago) known as barring contingent remainders has been in these practical days entirely done away with, the very name of "executory devise" is rapidly becoming obsolete. Unquestionably the principal importance of the distinction between executory devises and contingent remainders grew out of the fact that at common law the contingent remainders were destructible, whereas under *Pells* v. *Brown* executory devises were not; hence when this distinction is done away with by making all contingent future interests equally indestructible, it is not often desirable or necessary to classify contingent future interests under the former heads of remainders and executory devises, and it is perhaps questionable how far the practicing lawyer of the present day remembers the distinction which was once one of the fundamental distinctions of the law of property. At the same time, there are certain inherent differences between contingent remainders and executory devises which continue to exist in spite of the fact that they are both indestructible at the present day. For example, the most common form of executory devise is the giving by will of an estate in fee simple to A with the proviso that on the happening of a given contingency the fee shall be taken from A and given to B. By analogy to the older "uses", the gift to B in the above illustration may for convenience be described as a shifting executory devise. There is one not uncommon problem arising in connection with such shifting executory devises which it is proposed to briefly consider.

That problem has two sides which may be briefly stated as follows: We start in each case with the above illustration, to wit, an estate given by will to A in fee with a proviso that upon the happening of a given contingency it shall be given to B. The problems are: (1) Suppose for some reason A is incompetent to take—who is entitled? (2) Suppose the contingency

happens and that B for some reason cannot take—to whom does the estate belong?

Taking up the first problem, the alternatives are perfectly clear; if A cannot take, either B takes, or the property passes to the residuary devisee or to the heirs of the testator as the case may be. In an interesting line of cases on the subject the problem seems to have been originally treated as a contest between B and the residuary devisees or heirs of the testator, without recognizing that in order to the proper determination of the problem another factor must be determined, *i. e.*, has the contingency happened on which B was to take? It is believed that if the importance of determining this factor is always kept prominently in mind, any doubt that may seem to be raised by the cases can be easily removed. For example in *Jones* v. *Westcomb*,[1] A devised a term of years to his wife for life and "after her death to the child she was then enseint with. And if such child die before it came to 21", then to B. Upon the death of testator it appeared that the wife was not enseint; it was nevertheless held that the gift to B took effect. No attention appears to have been given to the inquiry whether the event had not *literally* happened (*i. e.*, the supposed unborn child ing our inquiry to this point, it is submitted that though the event had not *literally* happened (i. e., the supposed unborn child did not die before it came to 21) yet that *substantially* what the testator meant was that if such unborn child should not reach 21, B should take, and that properly construed this language includes the possibility of the supposed unborn child not ever being born (or even not ever having existed), as well as the possibility of such child being born and then failing to reach 21. It is submitted that in construing such a clause the court may properly take into consideration the influences which affect a man in making a disposition of this character, and may therefore construe such disposition not literally but to carry out the testator's real intent; but it should be carefully noted that this is a very different matter from simply ignoring the inquiry

[1] 1 Eq. Cas. Ab. 245 pl. 10.

whether the condition contemplated by the testator has occurred or not, and giving the property to B simply because the first taker does not take. The latter is believed to be an unsound method of approaching the problem involved.

In *Willing* v. *Baine* [2] the testator by will devised 200 pounds apiece to his children payable at their respective ages of 21 "and if any of them die before they are 21, then the legacy given to the person so dying to go to the surviving children." One of the children died in the testator's lifetime, and the question arose whether the legacy to him should go to the surviving children, or be treated as a lapsed legacy and sink into the surplus for the benefit of the residuary legatees. It was held that "the legacy was well given over to the surviving children." Though no stress is laid upon the point in the reported decision, yet it is clear that the condition had happened upon which the gift over was to take effect, *i. e.*, one of the children had died before reaching 21. The testator probably pictured to himself the case of a child surviving himself and thereafter dying under 21, but he has not in any sense stipulated that the gift over shall only take effect if the child shall survive him, and looking beyond the letter of the will to those sentiments which would naturally affect a testator under similar circumstances, it is difficult to see why if he had directly contemplated the possibility of the child dying in his lifetime, he should not still have made the same disposition of his property.

In *Avelyn* v. *Ward* [3] a testator devised certain real estate to his brother on condition that within three months after the testator's decease the brother should execute a general release of all claims against the estate: "But if his brother should neglect to give such release," then to B. The brother happened to die in the lifetime of the testator, and the question was whether the gift over to B should take effect. In sustaining the gift to B, Lord Hardwicke urges that "the question will very much turn on this: whether this devise over is to be considered, and

[2] 3 P. Wms. 113.
[3] 1 Ves. Sr. 420.

the contingency on which it is given, as a strict condition, or a conditional limitation", and holds that the gift over to B was a conditional limitation, and that therefore, the strict letter of the contingency need not be complied with. In these more practical days, however, when the legal mind is not so impressed with the significance of fine spun distinctions between conditions and conditional limitations, it would seem a sounder view simply to inquire whether, considering the matter from the point of view of the testator, the event had happened on which B was to take, and it is submitted that the event had happened. B was intended to take this land unless the brother executed a general release; this the latter did not do. True he died before the testator and it could not, therefore, literally be said that he had either *neglected* or *refused* to give such general release; nevertheless the fact remains that the testator's scheme clearly was that B was to take this real estate unless the brother should give such general release, and as the brother did not do so (though with no default on his part) it is clear that B ought to take. The result reached by Lord Hardwicke seems, therefore, clearly right, altho the method of reaching it is perhaps subject to criticism. In *Doe* v. *Brabant*[4] the testatrix gave certain funds to trustees in trust for her stepdaughter then of the age of 12 years until she should attain 21, with direction to pay the principal to her on reaching 21. There was a further proviso in case she should die under 21 leaving children, that such children should take on reaching 21; and finally a proviso in case she should die under 21 without leaving children, or leaving children and they should all die under 21, then to B. The stepdaughter married, reached 21 and died in the testator's lifetime leaving two children. The question was whether they were entitled to the fund, and it was held that they were not because their mother did not die under 21. Hence the gift to any children of hers on reaching 21 became ineffective. There can be no doubt as to the propriety of this decision; the case is particularly important because all of the judges in their short opinions

[4] 4 T. R. 706.

agree in the statement of the reason why the gift over should not take effect. Lord Kenyon for example says, "Here nothing was given to the grandchildren, but upon an event which did not happen." This very briefly reported case brings out clearly the underlying principle. It is quite possible—indeed it is almost certain—that if the testatrix had foreseen what happened she would have in that case made the same disposition to the children of her stepdaughter; but it is entirely clear that the court has not the right to make any guess, however likely, as to what the testatrix would have done—on the contrary the court is limited to deciding whether fairly construed the event has happened on which the testatrix intended the gift over to take effect.

In *Lomas* v. *Wright*[5] a testator having several legitimate children by one Mary Lomas, by deed of trust conveyed certain properties to trustees in trust in case she should have another such child, then such after born child would be entitled out of the income to an annuity of 25 pounds, and subject to such charge the principal of said trust fund to be held for the use of one H; in case, however, H should die under age and without issue, then the principal to be held for the use of such after born child if a son, in fee; but if there should be no after born son, or in case there should be one and he should die under age and without issue, then the principal to be held for the use of one O. There was an after born son who attained his age of 21, but who was incompetent to take under the familiar rule invalidating devises which tend to encourage illicit relations. H died under age and without issue, and the question was whether O should take. It was claimed on his behalf that the only prior beneficiaries were H and the after born son, and that they being for different reasons out of the way, the executory devise to O should take effect. It was held, however, that as the gift to O was conditioned on the after born child dying before reaching 21, and as in fact he attained 21, the gift to O failed. It will be noted that the principle previously stated was here correctly applied.

[5] 2 Myl. & K. 769.

In *Tarbuck* v. *Tarbuck*[6] the testator devised certain lands to his son James for life, remainder to his children in equal shares in fee; he devised certain other lands to his son Jonathan for life, remainder to his children in equal shares in fee. He then provided that if either should die without leaving lawful issue the lands devised to him for life should go to his brother in fee. And further that if both should die without leaving lawful issue, both parcels of land should go to X in fee. Both the sons died in the testator's lifetime, James leaving a child who survived his father and his Uncle Jonathan, but who died in the lifetime of the testator, and Jonathan dying without children. The question was whether the gift over to X took effect. In holding that it did not, the Master of the Rolls pointed out that the gift to X was only to take effect in the event of James and Jonathan dying without children, and that the circumstance that they happened to die in the testator's lifetime was immaterial. Again the principle above stated was correctly applied.

In *Eavestaff* v. *Austin*[7] the testatrix having created a fund on which the interest was to be paid to her brother William during his life, provided that at his death a portion should be set apart and the income thereon paid to a granddaughter A for her life; "and I direct that after her death the same (apparently meaning the income) shall be equally divided between the children of my nephew J." By a codicil to her will the testatrix revoked the gift of the annuity to A, and when the testatrix and the brother had both died A was still living, and the question was whether the bequest to the children of J was accelerated by the revocation of the bequest to A, or whether its enjoyment was to be postponed till the decease of A. The Master of the Rolls held that the bequest was accelerated. There is an obvious distinction between this and the prior cases. In this case the holder of the future interest originally had, not an executory devise which was subject to a contingency which might not happen, but a vested future interest, and it is therefore consistent

[6] 4 L. J. & S. Ch. 129.
[7] 19 Beav. 591.

with the principle established in the prior cases to allow the gift over to take effect sooner than was originally intended; the only alternative would be a partial intestacy (in this case till the death of A), and there is a very strong presumption against any such consequence.

Hughes v. *Ellis* [8] is an interesting case. By will dated 1823 the testator devised the residue of his estate to his wife; but if she should die intestate then to X. She died intestate a few weeks before the testator, and the question was whether the gift over took effect; it was held by the Master of the Rolls that it did not. The decision is correct. At the time a married woman was not legally competent to make a will; so that, though the testator had not used such expression, it was entirely evident that he must have meant that if his wife should die intestate *after his own death,* X should take. Even in these more modern days when a married woman may lawfully make a will, it is submitted that the same result should be reached, for the reason that though the testator does not expressly say so, he evidently must mean that if his wife should die intestate *as to the property received from him,* then X should take, and in the very nature of things it would be impossible for his wife to dispose of the property received from him by her will unless she survive him, and thereby receive something from him.

The net result of the cases therefore is that although the decisions were not always based on the correct principle, yet since the principle has been clearly established there is now no question but what the gift over to B will not take effect simply because the prior gift to A has for some reason failed; in order to enable B to claim he must be able to show, not simply that A is out of the way, but also in addition that the contingency on which he B was to take has, not necessarily literally, but at least substantially occurred.

The second class of cases presents the converse of those just considered. In the second group the devise to A in fee has taken effect, the contingency on which the fee is to go to B

[8] 20 Beav. 193.

has also happened, and the difficulty is caused by the fact that B for some reason is incompetent to take. The question arises whether, as B clearly cannot take, the property shall pass to the residuary devisees or heirs of the testator on the one hand, or whether it shall continue in A on the theory that it was only taken from A in order that B might have it, and that if B cannot take, A shall not be deprived. The cases on this point are not in agreement as will appear from the following short examination of the principal authorities.

In *Harrison* v. *Foreman*[9] a testator by will devised certain annuities to one B for life, and after her decease, the principal to be given to one P and one S in equal shares; in case either of them died in B's lifetime, the whole to the survivor living at B's death. P and S both died after the testator but in the lifetime of B; upon B's death the fund was claimed by the representative of P and S and by the residuary devisees of the testator. The Master of the Rolls found in favor of the representative of P and S, holding that "the contingency described in that part of the will never took place; there being no survivor of these two persons at that time (meaning at the death of B)." The case is not an authority therefore on the question. What happens if the contingency has occurred and B cannot take? It simply construes the condition, holding that the thing contemplated by the testator not having happened at all, there is no reason why the property should be taken from A.

In *Jackson* v. *Noble*[10] a testator gave certain moneys to trustees in trust for his daughter M during her life and at her death for her heirs; provided that in case she should have no children, the principal should go to his son G, or in case of his decease before M, then to his children. After the testator's death G died without leaving children. The question was what the effect of this was upon M's estate; obviously G could not take it because the gift to him was contingent on his surviving M, and his children could not take because he left no children.

[9] 5 Ves. 207.
[10] 2 Keen, 590.

It was held by the Master of the Rolls "that the gift over was to take effect only in the event of M's marrying and dying without issue in the lifetime of her brother, or of such child or children as he might happen to leave". As she had not died in the lifetime of her children or of any child or children of his, he decided that the estate of M became indefeasible.

Doe v. *Eyre* [11] is perhaps the leading case in England. One M had a power of appointment of a fund among her children; she made certain appointments to her two children with a proviso that if neither should be living at her husband's death her father-in-law should take. Both of them died before the husband, who of course was incompetent to take within the language of the power. It was held that as the event had happened on which the testatrix expected the father-in-law to take, the originally vested interests of the two children determined and the estate passed as in default of appointment. The case is almost unique in that it contains an elaborate note by the reporter questioning, on the authority of *Jackson* v. *Noble,* the propriety of the decision reached by the court.[12]

Doe v. *Eyre* has been consistently followed in England. In *Robinson* v. *Wood* [13] the testator devised certain property to his daughter H in fee with a proviso that if she should die under 21 leaving lawful issue, the issue to take as tenants in common; but in case she should die under 21 without lawful issue, then in trust for his wife if she should be then his widow, and unmarried, and one N for life, and after the decease of the survivor to pay the proceeds to P Society. The testator died leaving his daughter A surviving him, and the testator's widow and N both died in the lifetime of the daughter, who later died under 21, without ever having been married. This was a suit filed by the daughter's heir at law claiming that, as the gift to

[11] 5 C. B. 713.

[12] Sugden on Powers 513-4 comments on the reporter's note, approves the finding in *Doe* v. *Eyre,* but adds (as indeed is obvious) that if inconsistent with the prior case of *Jackson* v. *Noble, Doe* v. *Eyre* being a decision by the Exchequer Chamber of course overrules the prior Chancery decision.

[13] 27 L. J. Ch. 276.

the P Society was void under the Statute of Mortmain, he was entitled. Following *Doe* v. *Eyre* somewhat reluctantly the Vice-Chancellor held that the heir-at-law of the daughter was not entitled. Finally in *O'Mahoney* v. *Burdett*.[14] there was a gift by will to one A with a proviso that if she should die unmarried or without children then to B. B died in the lifetime of the testator so that the gift to him lapsed. It was held nevertheless by the House of Lords that A's gift was divested upon her death without children. It must, therefore, be taken as settled under the English decisions that if the contingency happens, the gift to A fails even though the gift over to B does not take effect. It should be added that Jarman [15] attempts to reconcile *Jackson* v. *Noble* with *Doe* v. *Dyre,* saying "The difference in short is between a failure of the posterior gift by lapse, letting in the title of the heir or residuary devisee (as the case may be), and a failure in event, of which the prior devisee has the benefit." It, of course, is true that if the event has not happened on which the gift to A fails, A continues to enjoy his gift, but it is a little difficult to see why in *Jackson* v. *Noble* the contingency contemplated, namely the death of the daughter without child or children, did not happen, and why therefore the problem is not the same in that case as in *Doe* v. *Eyre,* namely, assuming that the contingency has happened, but that the gift over for some reason cannot take effect, shall A continue to hold, and the English cases with the exception of *Jackson* v. *Noble* held with reasonable uniformity that he shall not.

It would unduly prolong this paper to discuss the American cases, which will be only briefly referred to. *Drummond* v. *Drummond* [16] and *Duscnberry* v. *Johnson,*[17] in both of which the general doctrine of *Jackson* v. *Noble* is approved, although in the latter *Doe* v. *Eyre* was sought to be distinguished from *Jackson* v. *Noble* on very doubtful grounds.

It is submitted that much is to be said in opposition to the

[14] L. R. 7 H. L. 388.
[15] 5 American Edition, chapter 50, English edition of 1910, chapter 58.
[16] 11 C. E. Green 234.
[17] 59 N. J. Eq. 336.

English authorities and in favor of the view that though the contingency has happened, yet if B cannot for some reason take, the estate shall become indefeasible in A. Of course the testator could, if he chose, take the estate from A on the happening of the contingency irrespective of whether B was able to take, but why assume that he would so intend? The real point for consideration is what the testator has intended shall happen in a situation where the testator has not clearly expressed his intention, *i. e.*, in case of the contingency having occurred *and* the gift over failing to take effect. There is of course a presumption in favor of vested rather than contingent gifts; cannot this presumption be properly extended to a case like this, with the result that the gift remains with the original devisee, who is undoubtedly the primary object of the testator's bounty, rather than go to his residuary devisees or heirs? The general presumption against intestacy may also be invoked. It is submitted that while the easy solution is the one furnished by the English decisions, yet that the testator's intent is more likely to be accomplished if the ruling of cases like *Jackson* v. *Noble* is adopted.

Reynolds D. Brown.

Law School, University of Pennsylvania.